4. AG Opinions Regarding Do Not Resuscitate

AG Opinion 6986 on Do Not Resuscitate: AFC Facilities
AG Opinion 7009 on Do Not Resuscitate: Minors
AG Opinion 7056 on Do Not Resuscitate: Patient Advocate
PA 193 of 1966, revised (DNR definitions)
Case Law – DNR of an Incapacitated Adult

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

ADULT FOSTER CARE FACILITIES:

Application of Michigan Do-Not-Resuscitate Procedures Act to adult foster care facilities

The Adult Foster Care Facility Licensing Act does not require that an adult foster care facility resuscitate its resident whose heart and breathing have stopped and who has executed a valid do-not-resuscitate order pursuant to the Michigan Do-Not-Resuscitate Procedure Act.

Opinion No. 6986

June 16, 1998

Honorable John J. H. Schwarz, M.D.
State Senator
The Capitol
Lansing, MI 48909-7536

You have asked whether the Adult Foster Care Facility Licensing Act requires an adult foster care facility to resuscitate its resident whose heart and breathing have stopped and who has executed a valid do-not-resuscitate order pursuant to the Michigan Do-Not-Resuscitate Procedure Act.

The Michigan Do-Not-Resuscitate Procedure Act (MDNRPA), 1996 PA 193, MCL 333.1051 *et seq*; MSA 14.15(1051) *et seq*, took effect on August 1, 1996. The Legislature's purpose in adopting this act is succinctly described in the Senate Legislative Analysis that accompanied SB 452, which became the MDNRPA:

> Hospitals and many long-term health care facilities have over the years developed policies and procedures for honoring do-not-resuscitate requests from seriously ill patients, but no such system has evolved for handling the cases of persons *outside a health facility*. . . . Senate Bill 452 creates a legally recognized means whereby such requests will have to be honored.

Senate Legislative Analysis, SB 452, August 6, 1996. (Emphasis added.)

Consistent with this purpose, section 2(c) of this act defines the term "Do-not-resuscitate order," for purposes of that Act, as:

> [A] document executed pursuant to section 3 or 5 directing that, in the event that a patient suffers cessation of both spontaneous respiration and circulation in a setting outside of a hospital, a nursing home, or a mental health facility owned or operated by the department of community health, no resuscitation will be initiated.

Pursuant to section 3 of the act, a person who is 18 years of age or older and who is of sound mind, or his or her patient advocate,

may execute a do-not-resuscitate order pursuant to the specific procedures described in the act. A do-not-resuscitate order directs that in the event that a declarant's heart and breathing should stop, no person shall attempt to resuscitate the declarant. Section 2(c), *supra*, and section 4. A person is not subject to civil or criminal liability for withholding resuscitative measures from a declarant. Section 12. Such immunity would not, of course, shield a person from responsibility from an intentional or negligent act or omission which may cause a declarant's heart or breathing to stop.

The Adult Foster Care Facility Licensing Act (AFCFLA), 1979 PA 218, MCL 400.701 *et seq*; MSA 16.610(51) *et seq*, provides for the licensing and regulation of adult foster care facilities. Section 3(4) of the AFCFLA defines an "adult foster care facility" as "a governmental or non-governmental establishment that provides foster care to adults" and includes "facilities and foster care family homes for adults who are aged, mentally ill, developmentally disabled, or physically handicapped who require supervision on an ongoing basis but who do not require continuous nursing care." However, section (3)(4) goes on to provide that the term "adult foster care facility" does *not* include, *inter alia*, a nursing home or a hospital licensed under article 17 of the public health code, or a hospital for the mentally ill or a facility for the developmentally disabled operated by the state under the mental health code. Thus, an adult foster care facility, by definition, is not "a hospital, a nursing home, or a mental health facility owned or operated by the department of community health" within the meaning of the MDNRPA and, in the absence of any provision to the contrary, would appear to be precisely the type of setting in which the MDNRPA was intended to apply.

As part of the function of licensing and regulating adult foster care facilities, the AFCFLA establishes the standard of care that must be provided by an adult foster care facility. To that end, foster care is defined by that act as "the provision of supervision, personal care, *and protection* in addition to room and board, for 24 hours a day, 5 or more days a week, and for 2 or more consecutive weeks for compensation." Section 4(6) (emphasis added). The term "protection," in turn, is defined in section 6(4) of the AFCFLA as follows:

> "Protection," *subject to section 26a(2),* means the continual responsibility of the licensee to *take reasonable action to insure the health, safety, and well-being of a resident, including protection from physical harm,* humiliation, intimidation, and social, moral, financial, and personal exploitation while on the premises, while under the supervision of the licensee or an agent or employee of the licensee, or when the resident's assessment plan states that the resident needs continuous supervision.

(emphasis added).

Section 26a(2), referenced in this definition, provides:

> A licensee providing foster care to a resident who is enrolled in a licensed hospice program and whose assessment plan includes a do-not-resuscitate order is considered to be providing protection to the resident for purposes of section 6(4) and the rules promulgated under this act if, in the event the resident suffers cessation of both spontaneous respiration and circulation, the licensee contacts the licensed hospice program.

Your question asks, in essence, whether an adult foster care facility's obligation to provide protection as defined in section 6(4) of the AFCFLA, *supra*, requires the facility to attempt to resuscitate a resident even when the resident has previously executed a valid do-not-resuscitate order pursuant to the MDNRPA.

It is significant in this regard that both the current definition of "protection" contained in section 6(4) of the AFCFLA and the related provisions of section 26a(2) of that act were added to that act simultaneously with the adoption of the MDNRPA and, in fact, were tie-barred to the enactment of the latter act. Statutes which pertain to the same general subject matter or have a common purpose, such as the MDNRPA and the AFCFLA, are required, under rules of statutory construction, to be construed together. This rule of statutory construction, restated in *Boards of County Road Comm'rs v Bd of State Canvassers*, 50 Mich App 89, 103; 213 NW2d 298 (1973), *aff'd* 391 Mich 666; 218 NW2d 144 (1974):

> "[*A*]*pplies with peculiar force to statutes passed at the same session of the Legislature, especially where they are passed or approved on the same day, or where statutes are passed or approved at about the same time, or where one refers to the other*, or is declared to be cumulative. It is to be presumed that such acts are imbued with the

> same spirit and actuated by the same policy, *and they are to be construed together as if parts of the same act*, or supplemental to each other."

(Emphasis in original; citation omitted.)

Applying this rule of construction, the definition of protection under the AFCFLA must be construed in a manner that is consistent with the MDNRPA, which specifically authorizes the withholding of resuscitation from a resident who has, pursuant to the MDNRPA, executed a valid do-not-resuscitate order directing that he or she not be revived following expiration. Similarly, the fact that section 26a(2) of the AFCFLA specifically refers only to patients enrolled in a licensed hospice program cannot be read as limiting the provisions of the MDNRPA in adult foster care provisions only to such hospice enrolled residents. Such a reading would clearly contravene the plain intent of the Legislature in its simultaneous adoption of the MDNRPA and amendment of the AFCFLA.

It is my opinion, therefore, that the Adult Foster Care Facility Licensing Act does not require that an adult foster care facility resuscitate its resident whose heart and breathing have stopped and who has executed a valid do-not-resuscitate order pursuant to the Michigan Do-Not-Resuscitate Procedure Act.

FRANK J. KELLEY
Attorney General

http://www.michigan.gov/ag/

STATE OF MICHIGAN

JENNIFER M. GRANHOLM, ATTORNEY GENERAL

HEALTH CARE:

MICHIGAN DO-NOT-RESUSCITATE PROCEDURES ACT:

MINORS:

Application of Michigan Do-Not-Resuscitate Procedure Act to persons under 18 years of age

The Michigan Do-Not-Resuscitate Procedure Act does not authorize a do-not-resuscitate order executed by a person under 18 years of age, or by a patient advocate for a person under 18 years of age.

Opinion No. 7009

March 2, 1999

Honorable Joanne G. Emmons
State Senator
The Capitol
Lansing, Michigan

You have asked whether the Michigan Do-Not-Resuscitate Procedure Act authorizes a do-not-resuscitate order executed by a person under 18 years of age, or by a patient advocate for a person under 18 years of age.

The Michigan Do-Not-Resuscitate Procedure Act (MDNRPA), 1996 PA 193, MCL 333.1051 *et seq*; MSA 14.15(1051) *et seq*, took effect on August 1, 1996. The Legislature's purpose in adopting this act is succinctly described in the Senate Legislative Analysis that accompanied SB 452, which became the MDNRPA:

> Hospitals and many long-term health care facilities have over the years developed policies and procedures for honoring do-not-resuscitate requests from seriously ill patients, but no such system has evolved for handling the cases of persons *outside a health facility* . . . . Senate Bill 452 creates a legally recognized means whereby such requests will have to be honored.

Senate Legislative Analysis, SB 452, August 6, 1996. (Emphasis added.)

Section 2 of the MDNRPA defines a do-not-resuscitate order as "a document executed pursuant to section 3 or 5" of the act. Sections 3 and 5 provide that the execution of a do-not-resuscitate order may be made by persons "18 years of age or older," or by a patient advocate of a person "18 years of age or older." Section 2(n) defines a patient advocate as "an individual designated to make medical treatment decisions for a patient under section 496 of the revised probate code." Section 496 of the Revised Probate Code, MCL 700.1 *et seq*; MSA 27.5001 *et seq*, provides that:

> A person *18 years of age or older* who is of sound mind at the time a designation is made may designate in writing a person who is 18 years of age or older to exercise powers concerning care, custody, and medical treatment decisions for the person who made the designation. For purposes of this section, a person who is named in a designation to exercise powers concerning care, custody, and medical treatment decisions shall be known as a patient advocate and a person who makes a designation shall be known as a patient.

(Emphasis added.)

Therefore, a patient advocate may only be designated as such by a person 18 years of age or older. No exception is made in either the MDNRPA or the Revised Probate Code for a patient advocate to act on behalf of a person under 18 years of age.

The first step in ascertaining legislative intent is to look to the text of the statute. *Piper v Pettibone Corp*, 450 Mich 565, 571; 542 NW2d 269 (1995). A clear and unambiguous statement must be enforced by the court as written according to its plain meaning. *Dean v Dep't of Corrections*, 453 Mich 448, 454; 556 NW2d 458 (1996). In such instances, statutory construction is neither required nor permitted, rather, the court must apply the statutory language as written. *Piper*, 450 Mich at 572.

Had the Legislature intended the MDNRPA to be applicable to persons under 18 years of age, or their patient advocates, it would have so stated. On the contrary, the MDNRPA expressly limits its application to persons at least 18 years of age. It is presumed that the Legislature did not intend to do a useless thing; thus, a court must construe the statute so as to give effect to all portions thereof as reasonably possible. *Hengartner v Chet Swanson Sales Inc*, 132 Mich App 751, 755; 348 NW2d 15 (1984).

It is my opinion, therefore, that the Michigan Do-Not-Resuscitate Procedure Act does not authorize a do-not-resuscitate order executed by a person under 18 years of age, or by a patient advocate for a person under 18 years of age.

JENNIFER M. GRANHOLM
Attorney General

STATE OF MICHIGAN

JENNIFER M. GRANHOLM, ATTORNEY GENERAL

ADVANCE DIRECTIVES:

GUARDIAN AND WARD:

HEALTH CARE:

MENTAL HEALTH:

DO-NOT-RESUSCITATE ORDER:

PATIENT ADVOCATE:

Authority of guardian to sign patient advocate designation on behalf of ward

Authority of guardian to sign do-not-resuscitate order on behalf of ward

---

A guardian of a developmentally disabled adult who is not of sound mind lacks authority under the Patient Advocate Act to sign a designation of patient advocate on behalf of the ward.

A guardian of a developmentally disabled adult who is not of sound mind lacks authority under the Michigan Do-Not-Resuscitate Procedure Act to sign a do-not-resuscitate order on behalf of the ward.

Opinion No. 7056

June 20, 2000

Honorable Charles LaSata
State Representative
The Capitol
Lansing, MI

You have asked two questions regarding the authority of a court-appointed guardian of a developmentally disabled ward to sign advance directives on behalf of the ward. Information supplied by your office indicates that your questions relate specifically to adult wards who are determined by the court to be persons not of sound mind. Answering your questions requires an examination of the Patient Advocate Act, the Michigan Do-Not-Resuscitate Procedure Act, and the Mental Health Code.

When important medical decisions must be made, the patient is consulted and his or her preferences are generally followed. When a patient is incapacitated by illness or injury, however, others must make the medical decisions. To address situations where a patient may become unable to communicate medical decisions, the Legislature has authorized adults to sign two types of advance directive. The Patient Advocate Act, 1998 PA 386, Part 5 of the Estates and Protected Individuals Code (EPIC)[1], MCL 700.1101 *et seq*; MSA 27.11101 *et seq*, permits an adult to designate a patient advocate to make medical treatment decisions when the patient is unable to participate in such decisions. The Michigan Do-Not-Resuscitate Procedure Act (MDNRPA), 1996 PA 193, MCL 333.1051 *et seq*; MSA 14.15(1051) *et seq*, permits an adult to sign a do-not-resuscitate order under certain circumstances, and provides an exemption from criminal and civil liability for withholding medical treatment. Both of those acts

explicitly require that an adult must be "of sound mind" in order to sign an advance directive.

The Mental Health Code, 1974 PA 258, MCL 330.1001 *et seq*; MSA 14.800(1) *et seq*, authorizes a probate court to appoint a guardian for a developmentally disabled person. Section 618. A guardian fulfills a different and broader role than a patient advocate. A patient advocate can only authorize certain medical decisions. A guardian can act for his or her ward in a variety of situations, not just medical ones. To the extent ordered by the court, a guardian who acts in good faith may authorize routine or emergency medical treatment or surgery or extraordinary procedures and shall not be liable for civil damages for any injury the ward may sustain. Section 629(1). The powers of a guardian who has been given power over routine medical procedures, however, do not extend to the authorization of any "extraordinary" medical procedure, which "includes, but is not limited to, sterilization, including vasectomy, abortion, organ transplants from the ward to another person, and experimental treatment." Section 629(3). Article V, Part 3 of the EPIC addresses the powers of a guardian of an incapacitated person. Except as modified by court order, a guardian may give the consent necessary to enable the ward to receive medical or other professional treatment. Section 5314(c). A guardian may authorize removal of life-extending care, if there is clear and convincing evidence of the ward's expressed, or previously expressed, desires regarding life support under the given circumstances. *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). "[I]n general, judicial involvement in the decision to withhold or withdraw life-sustaining treatment on behalf of a minor or other incompetent patient need occur only when the parties directly concerned disagree about treatment, or other appropriate reasons are established for the court's involvement." *In re Rosebush*, 195 Mich App, 675, 687; 491 NW2d 633 (1992).

Your first question asks whether a guardian of a developmentally disabled adult who is not of sound mind has authority under the Patient Advocate Act to sign a designation of patient advocate on behalf of the ward.

The Patient Advocate Act authorizes a person to designate another adult as a patient advocate.[2] The patient advocate may exercise powers concerning the care, custody, and medical treatment decisions for the person making the designation (the "patient"), when the patient is unable to participate in medical treatment decisions. Section 5506 of this Act, which delineates the procedures for signing a patient advocate designation, provides that:

> (1) An individual 18 years of age or older *who is of sound mind at the time the designation is made* may designate in writing another individual who is 18 years of age or older to exercise powers concerning care, custody, and medical treatment decisions for the individual making the designation. . . .
>
> (2) A designation under this section must be in writing, signed, witnessed as provided in subsection (3), dated, *executed voluntarily*, and, before its implementation . . . .
>
> (3) A designation under this section must be executed in the presence of and signed by 2 witnesses. . . . A witness shall not sign the designation *unless the patient appears to be of sound mind* . . . .

(Emphasis added.)

The designated patient advocate may exercise only those powers of medical treatment decisions that "the patient could have exercised on his or her own behalf." Section 5507(1) of EPIC. A patient advocate may "withhold or withdraw treatment that would allow a patient to die only if that *patient has expressed in a clear and convincing manner* that the patient advocate is authorized to make such a decision, and that *the patient acknowledges that such a decision could or would allow the patient's death*." Section 5507(4) of EPIC. (Emphasis added.)

When read together, these provisions of the Patient Advocate Act demonstrate the Legislature's clear intent that a person must be *of sound mind* in order to sign a patient advocate designation and that the requisite witnesses shall not sign the designation unless the patient *appears to be of sound mind*. This legislative intent must be carried out "according to its plain meaning." *Dean v Dep't of Corrections*, 453 Mich 448, 454; 556 NW2d 458 (1996). Under the facts posed in your question, the person is not of sound mind and, therefore, may not personally sign a patient advocate designation. Moreover, nothing contained in the Patient Advocate Act authorizes a guardian to sign a patient advocate designation on behalf of his or her ward. While the guardian of a developmentally disabled ward is authorized by the Mental Health Code to make medical decisions for the ward, the guardian is not empowered to delegate that authority to any other person by signing a patient advocate designation. Thus, a guardian's designation of a patient advocate for his or her ward who is not of sound mind is not authorized by the Legislature.

It is my opinion, therefore, in answer to your first question, that a guardian of a developmentally disabled adult who is not of sound mind lacks authority under the Patient Advocate Act to sign a designation of patient advocate on behalf of the ward.

Your second question asks whether a guardian of a developmentally disabled adult who is not of sound mind has authority under the Michigan Do-Not-Resuscitate Procedure Act to sign a do-not-resuscitate order on behalf of the ward.

The MDNRPA authorizes a person to sign a do-not-resuscitate (D-N-R) order under certain circumstances, forbids certain persons from attempting to resuscitate the declarant, and provides an exemption from criminal and civil liability for withholding medical treatment. Section 3 of the MDNRPA, which delineates the procedures for signing a D-N-R order, provides that:

> (1) Subject to section 5,[3] an individual who is 18 years of age or older and *of sound mind* may execute a do-not-resuscitate order on his or her own behalf. A patient advocate of an individual who is 18 years of age or older may execute a do-not-resuscitate order on behalf of that individual.
>
> (3) The names of the declarant, the attending physician, and each witness shall be printed or typed below the corresponding signatures. A witness shall not sign an order unless *the declarant appears to the witness to be of sound mind* and under no duress, fraud, or undue influence.

(Emphasis added.)

The MDNRPA specifies the form of a D-N-R order. The declarant signing the D-N-R order must be *of sound mind*. The two attesting witnesses shall not sign the order unless the declarant *appears to be of sound mind*. Health professionals at locations "outside of a hospital, a nursing home, or a mental health facility owned or operated by the department of community health" who determine that a declarant who signed a D-N-R order has no vital life signs, "shall not attempt to resuscitate" the declarant. Section 11.

Reading these provisions of the MDNRPA together, the Legislature's intent is clear. Only adults of sound mind may execute a D-N-R order and may do so only on their own behalf. If an adult of sound mind has previously designated a patient advocate to make medical decisions for him or her, the patient advocate may sign a D-N-R order on behalf of that person. The Legislature has not authorized adults who are not of sound mind to sign a D-N-R order. Likewise, the Legislature has not authorized a guardian to sign a D-N-R order on behalf of his or her ward. Had the Legislature intended the MDNRPA to be applicable to a ward who is not of sound mind, or to the guardian of such a ward, "it would have so stated." OAG, 1999-2000, No 7009, p 10 (March 2, 1999). (Concluding that the MDNRPA does not authorize a do-not-resuscitate order to be executed by a person under age of 18 years or a patient advocate for such person.)

It is my opinion, therefore, in answer to your second question, that a guardian of a developmentally disabled adult who is not of sound mind lacks authority under the Michigan Do-Not-Resuscitate Procedure Act to sign a do-not-resuscitate order on behalf of the ward.

JENNIFER M. GRANHOLM
Attorney General

[1] Effective April 1, 2000, the Revised Probate Code was repealed and supplanted by the Estates and Protected Individuals Code (EPIC).

[2] The EPIC authorizes designation of a patient advocate under provisions "that are virtually unchanged from the [Revised Probate Code] provisions." Senate Legislative Analysis, SB 209, January 8, 1999.

[3] The reference to section 5 relates to persons who, because of religious beliefs, adhere to spiritual means for healing.

MICHIGAN DO-NOT-RESUSCITATE PROCEDURE ACT
Act 193 of 1996

AN ACT to provide for the execution of a do-not-resuscitate order for a patient in a setting outside of a hospital, a nursing home, or a mental health facility owned or operated by the department of community health; to provide that certain actions be taken and certain actions not be taken with respect to such an order; to provide for the revocation of a do-not-resuscitate order; to prohibit certain persons and organizations from requiring the execution of such an order as a condition of receiving coverage, benefits, or services; to prohibit certain actions by certain insurers; to exempt certain persons from penalties and liabilities; and to prescribe liabilities.

History: 1996, Act 193, Eff. Aug. 1, 1996.

The People of the State of Michigan enact:

333.1051 Short title.

Sec. 1. This act shall be known and may be cited as the “Michigan do-not-resuscitate procedure act”.

History: 1996, Act 193, Eff. Aug. 1, 1996.

333.1052 Definitions.

Sec. 2. As used in this act:

(a) "Attending physician" means the physician who has primary responsibility for the treatment and care of a declarant.

(b) "Declarant" means a person who has executed a do-not-resuscitate order or on whose behalf a do-not-resuscitate order has been executed as provided in section 3 or 5.

(c) "Do-not-resuscitate order" means a document executed as prescribed in section 3 or 5 directing that, in the event that a patient suffers cessation of both spontaneous respiration and circulation in a setting outside of a hospital, a nursing home, or a mental health facility owned or operated by the department of community health, resuscitation will not be initiated.

(d) "Do-not-resuscitate identification bracelet" or "identification bracelet" means a wrist bracelet that meets the requirements of section 7 and is worn by the declarant while a do-not-resuscitate order is in effect.

(e) "Emergency medical technician" means that term as defined in section 20904 of the public health code, MCL 333.20904.

(f) "Emergency medical technician specialist" means that term as defined in section 20904 of the public health code, MCL 333.20904.

(g) "Hospital" means that term as defined in section 20106 of the public health code, MCL 333.20106.

(h) "Medical first responder" means that term as defined in section 20906 of the public health code, MCL 333.20906.

(i) "Nurse" means a licensed practical nurse or a registered professional nurse as defined in section 17201 of the public health code, MCL 333.17201.

(j) "Order" means a do-not-resuscitate order.

(k) "Organization" means a company, corporation, firm, partnership, association, trust, or other business entity or a governmental agency.

(*l*) "Paramedic" means that term as defined in section 20908 of the public health code, MCL 333.20908.

(m) "Physician" means an individual licensed to engage in the practice of medicine or the practice of osteopathic medicine and surgery pursuant to article 15 of the public health code, MCL 333.16101 to 333.18838.

(n) "Patient advocate" means an individual designated to make medical treatment decisions for a patient under sections 5506 to 5515 of the estates and protected individuals code, 1998 PA 386, MCL 700.5506 to 700.5515.

(o) "Public health code" means 1978 PA 368, MCL 333.1101 to 333.25211.

(p) "Vital sign" means a pulse or evidence of respiration.

History: 1996, Act 193, Eff. Aug. 1, 1996;—Am. 2000, Act 59, Eff. Apr. 1, 2000;—Am. 2004, Act 552, Imd. Eff. Jan. 3, 2005.

333.1053 Execution of order; authorized persons; form; printed or typed names; signatures; witness; identification bracelet; possession; access.

Sec. 3. (1) Subject to section 5, an individual who is 18 years of age or older and of sound mind may execute a do-not-resuscitate order on his or her own behalf. A patient advocate of an individual who is 18 years of age or older may execute a do-not-resuscitate order on behalf of that individual.

© Legislative Council, State of Michigan Courtesy of www.legislature.mi.gov

(2) An order executed under this section shall be on a form described in section 4. The order shall be dated and executed voluntarily and signed by each of the following persons:

(a) The declarant or another person who, at the time of the signing, is in the presence of the declarant and acting pursuant to the directions of the declarant.

(b) The declarant's attending physician.

(c) Two witnesses 18 years of age or older, at least 1 of whom is not the declarant's spouse, parent, child, grandchild, sibling, or presumptive heir.

(3) The names of the declarant, the attending physician, and each witness shall be printed or typed below the corresponding signatures. A witness shall not sign an order unless the declarant appears to the witness to be of sound mind and under no duress, fraud, or undue influence.

(4) At any time after an order is signed and witnessed, the declarant or an individual designated by the declarant may apply an identification bracelet to the declarant's wrist.

(5) A declarant who executes an order under this section shall maintain possession of the order and shall have the order accessible within his or her place of residence or other setting outside of a hospital, a nursing home, or a mental health facility owned or operated by the department of community health.

History: 1996, Act 193, Eff. Aug. 1, 1996.

333.1054 Execution of order; form.

Sec. 4. A do-not-resuscitate order executed under section 3 shall include, but is not limited to, the following language, and shall be in substantially the following form:

"DO-NOT-RESUSCITATE ORDER

I have discussed my health status with my physician, _____. I request that in the event my heart and breathing should stop, no person shall attempt to resuscitate me.

This order is effective until it is revoked by me.

Being of sound mind, I voluntarily execute this order, and I understand its full import.

(Declarant's signature) (Date)

(Type or print declarant's full name)

(Signature of person who signed for declarant, if applicable) (Date)

(Type or print full name)

(Physician's signature) (Date)

(Type or print physician's full name)

ATTESTATION OF WITNESSES

The individual who has executed this order appears to be of sound mind, and under no duress, fraud, or undue influence. Upon executing this order, the individual has (has not) received an identification bracelet.

(Witness signature) (Witness signature) (Date)

(Date)

(Type or print witness's name) (Type or print witness's name)

THIS FORM WAS PREPARED PURSUANT TO, AND IS IN COMPLIANCE WITH, THE MICHIGAN DO-NOT-RESUSCITATE PROCEDURE ACT.".

History: 1996, Act 193, Eff. Aug. 1, 1996.

333.1055 Persons depending on spiritual means through prayer for healing; execution of order.

Sec. 5. (1) An individual who is 18 years of age or older, of sound mind, and an adherent of a church or religious denomination whose members depend upon spiritual means through prayer alone for healing may execute a do-not-resuscitate order on his or her own behalf. A patient advocate of an individual who is 18 years of age or older and an adherent of a church or religious denomination whose members depend upon spiritual means through prayer alone for healing may execute a do-not-resuscitate order on behalf of that individual.

(2) An order executed under this section shall be on a form described in section 6. The order shall be dated and executed voluntarily and signed by each of the following persons:

(a) The declarant or another person who, at the time of the signing, is in the presence of the declarant and acting pursuant to the directions of the declarant.

(b) Two witnesses 18 years of age or older, at least 1 of whom is not the declarant's spouse, parent, child, grandchild, sibling, or presumptive heir.

© Legislative Council, State of Michigan Courtesy of www.legislature.mi.gov

(3) The name of the declarant and of each witness shall be printed or typed below the corresponding signatures. A witness shall not sign an order unless the declarant appears to the witness to be of sound mind and under no duress, fraud, or undue influence.

(4) At any time after an order is signed and witnessed, the declarant or an individual designated by the declarant may apply an identification bracelet to the declarant's wrist.

(5) A declarant who executes an order under this section shall maintain possession of the order and shall have the order accessible within his or her place of residence or other setting outside of a hospital, a nursing home, or a mental health facility owned or operated by the department of community health.

History: 1996, Act 193, Eff. Aug. 1, 1996.

333.1056 Execution of order under § 333.1055; form.

Sec. 6. A do-not-resuscitate order executed under section 5 shall include, but is not limited to, the following language, and shall be in substantially the following form:

"DO-NOT-RESUSCITATE ORDER

I request that in the event my heart and breathing should stop, no person shall attempt to resuscitate me.
This order is effective until it is revoked by me.
Being of sound mind, I voluntarily execute this order, and I understand its full import.

(Declarant's signature) (Date)

(Type or print declarant's full name)

(Signature of person who signed for declarant, if applicable) (Date)

(Type or print full name)

ATTESTATION OF WITNESSES

The individual who has executed this order appears to be of sound mind, and under no duress, fraud, or undue influence. Upon executing this order, the individual has (has not) received an identification bracelet.

(Witness signature) (Witness signature) (Date)

(Date)

(Type or print witness's name) (Type or print witness's name)

THIS FORM WAS PREPARED PURSUANT TO, AND IS IN COMPLIANCE WITH, THE MICHIGAN DO-NOT-RESUSCITATE PROCEDURE ACT.".

History: 1996, Act 193, Eff. Aug. 1, 1996.

333.1057 Identification bracelet.

Sec. 7. (1) A do-not-resuscitate identification bracelet shall possess features that make it clearly recognizable as a do-not-resuscitate identification bracelet including, but not limited to, all of the following:

(a) The identification bracelet shall be imprinted with the words "DO-NOT-RESUSCITATE ORDER", the name and address of the declarant, and the name and telephone number of the declarant's attending physician, if any.

(b) The words required under subdivision (a) shall be printed in a type size and style that is as easily read as practicable, given the size of the identification bracelet.

(2) An individual shall not apply a do-not-resuscitate identification bracelet to another individual unless he or she knows that the other individual is a declarant. An individual who violates this subsection is guilty of a misdemeanor, punishable by imprisonment for not more than 2 years or a fine of not more than $1,000.00, or both.

History: 1996, Act 193, Eff. Aug. 1, 1996.

333.1058 Copy of order as permanent medical record.

Sec. 8. An attending physician who signs a declarant's do-not-resuscitate order under section 3 shall immediately make a copy or obtain from the declarant a duplicate of the executed order and make that copy or duplicate part of the declarant's permanent medical record.

History: 1996, Act 193, Eff. Aug. 1, 1996.

333.1059 Petition for review of order.

Sec. 9. If a person interested in the welfare of the declarant has reason to believe that an order has been executed contrary to the wishes of the declarant, the person may petition the probate court to have the order and the conditions of its execution reviewed.

© Legislative Council, State of Michigan Courtesy of www.legislature.mi.gov

History: 1996, Act 193, Eff. Aug. 1, 1996.

333.1060 Revocation of order.

Sec. 10. (1) A declarant or a patient advocate who executes an order on behalf of a declarant may revoke an order at any time and in any manner by which he or she is able to communicate an intent to revoke the order. If the revocation is not in writing, a person who observes the revocation shall describe the circumstances of the revocation in writing and sign the writing. Upon revocation, the declarant, patient advocate, or attending physician or a delegatee of the attending physician who has actual notice of the revocation shall destroy the order and remove the declarant's do-not-resuscitate identification bracelet, if the declarant is wearing a do-not-resuscitate identification bracelet.

(2) A physician or physician's delegatee who receives actual notice of a revocation of an order shall immediately make the revocation, including, if available, the written description of the circumstances of the revocation required by subsection (1), part of the revoking declarant's permanent medical record.

(3) A declarant's or patient advocate's revocation of an order is binding upon another person at the time that other person receives actual notice of the revocation.

(4) For purposes of subsections (1) and (2), a “delegatee” is an individual to whom a physician has delegated the authority to perform 1 or more selected acts, tasks, or functions under section 16215 of the public health code, being section 333.16215 of the Michigan Compiled Laws.

History: 1996, Act 193, Eff. Aug. 1, 1996.

333.1061 Determination by health professional.

Sec. 11. (1) One or more of the following health professionals who arrive at a declarant's location outside of a hospital, a nursing home, or a mental health facility owned or operated by the department of community health shall determine if the declarant has 1 or more vital signs, whether or not the health professional views or is provided with an order described in section 3 or 5 that is alleged to have been signed by the declarant or other person authorized to execute an order:

(a) A paramedic.

(b) An emergency medical technician.

(c) An emergency medical technician specialist.

(d) A physician.

(e) A nurse.

(f) A medical first responder.

(g) A respiratory therapist.

(2) If the health professional determines under subsection (1) that the declarant has no vital signs, and if the health professional determines that the declarant is wearing a do-not-resuscitate identification bracelet or is provided with a do-not-resuscitate order for the declarant, he or she shall not attempt to resuscitate the declarant.

History: 1996, Act 193, Eff. Aug. 1, 1996.

333.1062 Immunity from civil or criminal liability.

Sec. 12. A person or organization is not subject to civil or criminal liability for withholding resuscitative procedures from a declarant in accordance with this act.

History: 1996, Act 193, Eff. Aug. 1, 1996.

333.1063 Immunity from civil or criminal liability; conditions.

Sec. 13. A person or organization is not subject to civil or criminal liability for either of the following:

(a) Attempting to resuscitate an individual who has executed a do-not-resuscitate order or on whose behalf an order has been executed, if the person or organization has no actual notice of the order.

(b) Failing to resuscitate an individual who has revoked a do-not-resuscitate order or on whose behalf a do-not-resuscitate order has been revoked, if the person or organization does not receive actual notice of the revocation.

History: 1996, Act 193, Eff. Aug. 1, 1996.

333.1064 Requirement to execute order prohibited.

Sec. 14. A person or organization shall not require the execution of an order described in section 3 or 5 as a condition for insurance coverage, admittance to a health care facility, receiving health care benefits or services, or any other reason.

History: 1996, Act 193, Eff. Aug. 1, 1996.

© Legislative Council, State of Michigan Courtesy of www.legislature.mi.gov

333.1065 Life insurer; prohibited acts.

Sec. 15. A life insurer shall not do any of the following because of the execution or implementation of an order:

(a) Refuse to provide or continue coverage to the declarant.

(b) Charge the declarant a higher premium.

(c) Offer a declarant different policy terms because the declarant has executed an order.

(d) Consider the terms of an existing policy of life insurance to have been breached or modified.

(e) Invoke a suicide or intentional death exemption or exclusion in a policy covering the declarant.

History: 1996, Act 193, Eff. Aug. 1, 1996.

333.1066 Legal rights not impaired or superseded; presumptions.

Sec. 16. (1) The provisions of this act are cumulative and do not impair or supersede a legal right that an individual may have to consent to or refuse medical treatment for himself or herself or that a parent, guardian, or other individual may have to consent to or refuse medical treatment on behalf of another.

(2) This act does not create a presumption concerning the intent of a person executing an order to consent to or refuse medical treatment in circumstances other than the cessation of both spontaneous circulation and respiration.

(3) This act does not create a presumption concerning the intent of an individual who has not executed an order to consent to or refuse any type of medical treatment.

History: 1996, Act 193, Eff. Aug. 1, 1996.

333.1067 Effective date.

Sec. 17. This act shall take effect August 1, 1996.

History: 1996, Act 193, Eff. Aug. 1, 1996.

© Legislative Council, State of Michigan Courtesy of www.legislature.mi.gov

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF WAYNE

In the Matter of

HELEN M. SULLIVAN,
a legally incapacitated individual

Case No. 2006-702648 GA
Hon. Milton L. Mack, Jr.

and

ELEANOR HUDGENS,
a legally incapacitated individuals
_____/

Case No. 2005-686847 GA
Hon. Milton L. Mack, Jr.

OPINION

Manor of Wayne Continuing Care Center and Manor of Wayne - Skilled (collectively, "Manor") brought an Ex Parte Emergency Petition for Order Maintaining Status Quo; to Modify Guardianship, and to Prohibit Guardian from Signing "Do Not Resuscitate" Order against Respondent Guardian Care, Inc. ("Guardian Care") on March 29, 2010. Manor had refused to designate certain wards of Guardian Care as "No Code" or "Do Not Resuscitate" ("DNR"), including Helen M. Sullivan and Eleanor Hudgens. Guardian Care responded by stating it would remove all of its wards from Manor's facilities. This Court entered an order to maintain the status quo on March 29, 2010, and scheduled an evidentiary hearing on the issue of the authority of the guardian to execute DNR orders.

Manor argues that *In re Martin,* 450 Mich. 204; 538 N.W2d 399 (1995), provides that Guardian Care does not have the authority to execute a DNR order for its wards because Guardian Care cannot establish that its wards expressed their intentions, during a period of lucidity, that they would want a DNR order. Guardian Care argues that in the absence of

evidence of a ward's expressed wishes about such treatment, a guardian may determine the "best interest" of the ward and execute a DNR order without Court approval.

The Court took testimony and received briefs from the parties. At the hearing scheduled for August 10, 2010, the Court learned that Guardian Care had resigned as guardian of Helen Sullivan and Eleanor Hudgens. Manor requested that the Court still rule on the question presented in order to give guidance to the successor guardian.[1] This Court then adopted the findings of the Report of Guardian ad Litem, dated August 3, 2010, and entered an order that the guardian, and any successor guardian, was prohibited from ordering the ward be designated as DNR or "'no code" status, without obtaining a prior written order of the Court. The Court stated it would issue a written opinion.

FINDINGS OFF ACT

Manor operates two licensed nursing homes adjacent to each other on the same campus, located on Venoy Road in Wayne, Michigan. The Manor of Wayne Continuing Care Center ("WCC") is a 130-bed facility, and the Manor of Wayne - Skilled ("MWS") has 85 beds. Both facilities care for elderly, infirm individuals requiring nursing care. Many of these individuals suffer from varying degrees of dementia.

[1] See *People ex rel. Morgan County Department of Human Resources ex rel. Yeager,* 93 P 3d 589 (Colo. 2004), where despite the death of the ward during the pendency of the appeal the Colorado Court of Appeals adjudicated a question regarding the authority of the County Department of Human Services, acting as a guardian for an adult ward to execute a DNR order. The Court enunciated the two exceptions to the doctrine of mootness (I) the court may resolve an otherwise moot case if the matter is one that is capable of repetition yet evading review; and (2) the court may hear a moot case involving issues of great public importance or recurring constitutional violation. 93 P 3d 589, 592. Michigan jurisprudence employs a similar standard. See *Contesti v Attorney General,* 164 Mich App 271; 416 NW 2d 410 (1987); *Michigan Bell Telephone Company v Public Service Commission,* 85 Mich App 163; 270 NW 2d 546 (1978). The circumstances of the case at bar make it appropriate for the Court to invoke these exceptions to the mootness doctrine and adjudicate this matter.

Guardian Care is a professional guardianship agency with hundreds of wards for whom it is responsible. As of March 25, 2010, Guardian Care had fifteen (15) of its wards placed in the Manor's facilities, fourteen (14) at Manor of WCC and one (1) (Eleanor Hudgens) at MWS.

During the afternoon of March 26, 2010, WCC's administrator, Cheri Drew, spoke to Guardian Care's president, Georgia Callis, regarding Grace Coulston, one of Guardian Care's wards. Callis stated that she did not need a doctor or probate court's permission for a DNR order and was empowered to make anyone a DNR patient at any time, even if the person was not terminal. She further stated that she was immediately removing all fifteen (15) of her wards from Manor's facilities.

On the evening of March 26, 2010, Guardian Care removed Coulston from WCC against medical advice. Earlier that same afternoon, Callis faxed a letter to Manor advising Manor that it would be removing the remainder of its wards, including Helen M. Sullivan and Eleanor Hudgens, from WCC and MWS on March 29, 2010. Her letter states in part:

> This letter will further acknowledge that this office and yours have a fundamental difference of opinion with respect to the prerogatives and powers of a Guardian. As set forth in your company's Advance Directives Policy, it is our opinion that your company claims the right in many life-changing situations to substitute its own judgments for those of the Court-appointed Guardian.

Further, the letter went on to state:

> With this in mind, in reliance upon the best medical guidance we can obtain and with knowledge and/or approval of the families of these individuals where appropriate, please be advised that it is our intention to commence the safe and orderly relocation of our Wards from your facilities to others whose policies do not conflict with our exercise of the authority Guardian Care Inc. has been given as Guardian of these individuals, as we understand that authority.

On March 29, 2010, Manor secured an order from this court restraining Guardian Care from removing any of its wards without prior court approvaL The court took testimony on May 27, 2010. The testimony established that Helen M. Sullivan was not in any distress, participated

in activities, but required assistance. She was described as "pleasantly demented". The hearing was adjourned to August 10, 2010, for further testimony and briefing.

On August 4, 2010, Joseph P. Buttiglieri, the Guardian Ad Litem for Helen M. Sullivan and Eleanor Hudgens, submitted his report to the court. He found that while neither ward had the capacity to make informed decisions, their(sic) was no evidence that either had previously expressed any desires, one way or another, with regard to DNR orders. Both appeared to be "pleasantly demented." He opined that, generally, guardians may not execute a DNR order without prior court approval.

Just prior to the August 10, 2010, hearing, Guardian Care resigned as guardian for Helen M. Sullivan and Eleanor Hudgens and its other wards at Manor's facilities. Because Manor had sought instructions from the court on the issue of the authority of a guardian to issue a DNR order, and the issue presented is capable of repetition yet evading review, the Court issued an Order based upon the evidence presented, granting the petitions and ruling that a guardian may not issue a DNR order without prior Court approval.

CONCLUSIONS OF LAW

The issues for the Court to decide are: first; whether a Court appointed guardian for an incompetent ward has the authority to execute a DNR order on the ward's behalf without Court approval, and, second; if not, under what circumstances may a Court authorize a guardian to execute a DNR order.

The Estates and Protected Individuals Code ("EPIC")2 provides for the appointment of a guardian for a legally incapacitated adult.[3] The guardian "is responsible for the ward's care,

[2] MCL 700.1101 et seq.
[3] MCL 700.5301 et seq.

custody and control."[4] The guardian may provide the consent necessary to enable the ward to receive medical care.[5] EPIC does not address the authority of the guardian to execute DNR orders.[6]

The "Michigan do-not-resuscitate procedure act" ("DNR Act") provides a mechanism for patients and certain third parties to execute DNR orders.[7] A DNR order directs that, if a patient suffers cessation of both spontaneous respiration and circulation in a setting outside of a nursing home, resuscitation will not be initiated.[8] The Act permits a patient advocate to execute a DNR order on behalf of an individual.[9] A patient advocate is defined to mean an individual holding a power of attorney under EPIC.[10] A guardian is not included in the definition of patient advocate.

In contrast, the Michigan Dignified Death Act[11] provides explicit authority to patient advocates [12] and patient surrogates[13] Patient surrogates are defined to include legal guardians. The Act permits a guardian to withhold certain medical treatment, including, but not limited to, palliative care treatment, or a procedure, medication, surgery, a diagnostic test, or a hospice plan of care that may be ordered, provided, or withheld or withdrawn by a health professional or a health care facility under generally accepted standards of medical practice that is not prohibited

[4] MCL 700.5314
[5] MCL 700.5314(c).
[6] This is in contrast to 17 states which expressly provide for the authority of guardians to execute DNR orders without court approval in their statutes - Arizona (Arizona Code 36-3251), California (conservator authorized) (California Probate Code, Secs. 2355(a), 4617), Delaware (Delaware Code Title 16, Chapter 25, Sec. 2507(3)), Florida (Florida Statutes, Title XXIX, Sec. 401.45(3)(a), Georgia (Georgia Code 31-39-4(c)), Hawaii (Hawaii Code 32!-23.6(a)(I)), Illinois (744 ILCS 40/65(b)), Indiana (IC 16-36-5-11(b)), Missouri (RSMo 196.600(10), (I1), Ohio (ORC 2133.08), South Dakota (South Dakota Code 34-12F-2}, Tennessee (Tennessee Code, Sec. 68-11-1702), Vermont (I8 V.S.A. Sec. 9708), Wisconsin (Wisconsin Code 154.225), Wyoming (Wyoming Code 35-22-402), and the District of Columbia (DC ST 21-2210).
[7] MCL 333.1051 et seq.
[8] MCL 330.1052(c).
[9] MCL 330.1053(1).
[10] MCL 330. 1 052(n).
[11] MCL 333.5651 et seq.
[12] MCL 333.5653(1)(f).
[13] MCL 333.5653(I)(g). --

by law.[14] The Act does not speak to DNR orders although it could be argued that resuscitation is a "procedure" and the Act permits withholding a "procedure". However, the Act is limited in that it only permits the guardian the right to refuse medical treatment for a patient's terminal illness,[15] a terminal illness being defined as when, in the opinion of a doctor, death is expected within 6 months.[16]

The fact that the legislature provided patient advocates with authority under both Acts but did not provide authority to guardians under the DNR Act, suggests a deliberate decision to exclude guardians from those authorized to execute DNR orders under that Act. The Court cannot find any authority in EPIC, the DNR Act, or the Michigan Dignified Death Act which would authorize the guardian to execute DNR orders for its wards under the circumstances of these cases.[17] Neither Helen M. Sullivan nor Eleanor Hudgens have been determined to be terminal.

In the absence of express statutory authority, the Court must look to the common-law for the authority of a guardian to execute DNR orders. *In re Martin,* 450 Mich. 204; 538 N.W2d 399 (1995) appears to the Court to be the controlling case. The Supreme Court recognized that the right to refuse treatment is an aspect of the common-law doctrine of informed consent. While *In re Martin* involved a case of withholding treatment, the Supreme Court did not make this distinction in its analysis.[18] The Court held that the right to refuse death survived incapacity.[19] The Court then went on to determine the standard to be used in determining whether the guardian could withdraw treatment. The Court was careful to point out in several parts of its opinion that

[14] MCL 333.5653(l)(d).
[15] MCL 333.5655(b).
[16] MCL 333.5653(1)(h).
[17] Like the Court in *In re Martin,* it is not necessary for this Court to decide the question of whether a guardian could direct the withholding of life saving measures, like those described in the DNR Act, for tenninally ill patients, either with or without Court approval.
[18] *In re Martin,* at 2 I6.
[19] *In re Martin,* at 217-218.

this was the standard to be used under the facts of this case, thereby leaving the door open for the use of a different standard in a different case.[20]

The Supreme Court held that the "purely subjective analysis" test was the most appropriate standard to apply under the "circumstances of this case."[21] This meant that the guardian would have to establish by clear and convincing evidence that the ward, while competent, stated that he would refuse life-sustaining treatment under the present circumstances.[22] The Supreme Court observed that two of the ward's co-workers stated that the ward's present condition was not the type of injury he had talked about while competent. One doctor testified that the ward seemed content with his environment and could respond to simple yes or no questions. Perhaps most significantly, the Court cited testimony that certain witnesses received a "no" response when the ward was asked ifhe ever felt that he did not want to continue living. This testimony caused the Supreme Court to hold that the evidence was not "so clear, direct, and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."[23]

This Court finds that the standard to be applied under the circumstances of these cases is the purely subjective standard. Neither ward is in a persistent vegetative state, experiencing great pain or is terminally ill. No evidence has been presented to establish that either ward expressed her wishes relative to the execution of a DNR order prior to her incapacity.

CONCLUSION

While a guardian may be able to sign a DNR order without prior court approval under certain limited circumstances, under the circumstances of these cases, at this time, the guardian

[20] *In re Martin,* at 219, footnote 13,221,223, footnote *15* and 225. In footnote *15,* the Court stated that in other types of cases a more objective approach might be necessary.
[21] *In re Martin,* at 221.
[22] *In re Martin,* at 234.
[23] *In re Martin,* at 232-233.

must seek prior court approval. As such, in order to secure authority to execute a DNR order, the guardian was required to produce clear and convincing evidence of their wards' wishes when they were competent. The guardian failed to meet its burden of proof. Therefore, the Court grants the Petitioners' Emergency Petitions prohibiting Guardian Care, or its successors, from executing a DNR order.

September 9, 2010
Date

Hon. Milton L. Mack, Jr.
Judge of Probate